

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CAUSE NO. IP 05-219M-02
)	
DWAYNE BOWEN,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CAUSE NO. IP 05-219M-02
)	
DWAYNE BOWEN,)	
)	
Defendants.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant is charged in a criminal complaint issued on June 2, 2005, with conspiracy to possess with intent to distribute and/or distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1), 841(b)(1)(A)(ii), and 846, and possession with intent to distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 841(b)(1)(A)(ii).

On June 3, 2005, the government filed a written motion and moved for detention pursuant to Title 18 U.S.C. §§3142(e), (f)(1)(B), (f)(1)(C), and (f)(2)(A), on the grounds that the defendant is charged with an offense for which the maximum sentence is life imprisonment, a drug trafficking offense with the maximum term of imprisonment of ten years

or more is prescribed in the Controlled Substances Act, and that the defendant is a serious risk of flight, if released.

The preliminary hearing and detention hearing were held on June 13, 2005. The United States appeared by Barry D. Glickman, Assistant United States Attorney. Dwayne Bowen appeared in person and by his appointed counsel, Richard L. Ford.

At the preliminary hearing, the Government rested on the complaint and the affidavit attached thereto and tendered Special Agent Kerri L. Reifel, Federal Bureau of Investigation (FBI), for cross examination. Counsel for the defendant examined Special Agent Reifel on all issues before the Court. The defendant presented no additional evidence in the preliminary hearing, and the preliminary issue as to the defendant was submitted to the Court. The Court found that the evidence constituted probable cause to believe that the defendant committed the crimes charged in the complaint. The charges in the criminal complaint give rise to the presumptions that there are no condition or combination of conditions of release which will reasonably assure the safety of the community or that the defendant will not be a serious risk to flee if released.

The defendant did not rebut either the presumption that he is a danger to the community or the presumption that he is a risk of flight and, consequently, was ordered detained.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendant is charged in this cause by a criminal complaint issued on June 2, 2005, with conspiracy to possess with intent to distribute and/or distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1), 841(b)(1)(A)(ii), and 846,

and possession with intent to distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 841(b)(1)(A)(ii).

2. The penalty each count in the criminal complaint is a mandatory minimum sentence of 10 years and a maximum of life imprisonment. See 21 United States Code, Sections 841(b)(1)(A)(ii) and 841(b)(1)(A)(iii).

3. The Court takes judicial notice of the criminal complaint in this cause. The Court further incorporates the evidence admitted during the preliminary hearing and the detention hearing, as if set forth here.

4. The Government rested on the complaint and the affidavit attached thereto and tendered and tendered Special Agent Kerri L. Reifel, Federal Bureau of Investigation (FBI), for cross examination. Counsel for the defendant examined Special Agent Reifel on all issues before the Court. The defendant presented no additional evidence in the preliminary hearing, and the preliminary issue as to the defendant were submitted to the Court.

5. The Court finds there is probable cause for the offenses the defendant is charged with in the complaint, and the rebuttable presumptions arise that the defendant is a serious risk of flight and a danger to the community. Title 18 U.S.C. § 3142(e).

6. The Court admitted a Pre-Trial Services Report (PS3) regarding defendant Dwayne Bowen on the issue of his release or detention. Mr. Bowen is age 43 (DOB 10-2-61). The PS3 indicates the following:

(A) On March 23, 2000, Mr. Bowen was arrested in Porter County, Indiana, and was charged with Driving While Licence Suspended.

(B) On July 7, 1988, Mr. Bowen was arrested in Lake County, Indiana, and was charged with Possession of Marijuana. Disposition of that charge is unknown.

(C) On December 3, 1988, Mr. Bowen was arrested in Lake County, Indiana, and was charged with a Narcotics charge and Possession of a Firearm Without a Permit. Disposition of those charges are unknown.

(D) On September 2 1999, Mr. Bowen was arrested in Lake County, Indiana, and was charged with Leaving The Scene of an Accident. Disposition of that charge is unknown.

(E) Mr. Bowen refused to be interviewed by U.S. Probation for the PS3 and much of the information regarding his time in the community, employment, and substance abuse history are unverified.

7. The defendant has failed to rebut the presumption that he is a serious risk of flight, and a danger to the community and any other person. Therefore, Dwayne Bowen is ORDERED DETAINED.

8. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug

offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, §3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. See *United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moves for detention pursuant to §3142(f)(1)(B), (C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of §3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. 18 U.S.C. §3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986);

Fortna, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

9. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendants’ appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) 18 U.S.C. § 924(c); (3) 18 U.S.C. § 956(a); or (4) 18 U.S.C. § 2332b. 18 U.S.C. § 3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a § 3142(e) presumption is not such a “bursting bubble”. *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress’ finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case and have not been rebutted.

10. If the defendant had rebutted the presumptions, the Court would consider the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community is the defendant’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

11. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. On June 1, 2005, law enforcement agents, who were investigating the drug dealing activities of Anthony Howard, presented an affidavit in support of a search warrant for Howard's residence, located at 620 Jack Pine Court, Indianapolis, Indiana, to the Court. The Court reviewed the affidavit, determined probable cause existed, and accordingly issued the warrant.

b. On June 2, 2005 law enforcement officers began conducting surveillance in the area of Howard's residence. At approximately 7:35 a.m. two vehicles arrived at 620 Jack Pine Court. Surveillance units observed a 1996 Chevy Cavalier with an Indiana environmental license plate AD900, registered to Katherine Williams, 5807 Hayes Street, Merrillville, Indiana) park on the street in front of Howard's residence. The second vehicle, a Chevy Cobalt LS baring Indiana license plate 84A2039, Avis Rental Car out of Merrillville, Indiana) backed into the drive way of 620 Jack Pine Court. William E. Thomas who was driving the Cavalier exited his vehicle, walked past the vehicle in the driveway and proceeded to go inside Howard's residence. A short time later, Thomas walked out of Howard's residence and walked to the back of the Cobalt, where he opened the trunk and Thomas proceeded to handle items in the trunk. During this time, Dwayne Bowen, the driver of the Cobalt, got out of the vehicle, walked past Thomas, looked in the trunk, and proceeded to walk inside Howard's residence. Thomas, closed the trunk, threw a bag over his shoulder and proceeded to go inside Howard's residence. Approximately one minute later, Thomas and Bowen left Howard's residence and proceeded to get into their respective vehicles.

c. Law enforcement agents conducting surveillance followed the Cobalt and Cavalier for a short period of time. Approximately twenty minutes after Thomas and Bowen left from Howard's residence investigating agents executed the search warrant for Howard's residence at 620 Jack Pine Court, Indianapolis, Indiana. Almost simultaneously, the two vehicles driven by Thomas and Bowen, which were traveling southbound in I-465 were stopped by law enforcement after they committed various traffic violations.

d. Indianapolis Police Department (IPD) Officer Matt Hall stopped Bowen's vehicle. When Hall asked Bowen for permission to search his vehicle, Bowen gave Hall consent to search. During the search, Hall located two suitcases in the trunk of the vehicle which contained a total of forty two (42) kilograms of cocaine between the two pieces of luggage.

e. When IPD Officer Craig Wildauer attempted to effectuate a traffic stop on the vehicle driven by Thomas, Thomas drove away at a high rate of speed in an attempt to flee from Wildauer. Thomas continued to attempt to allude law enforcement and proceeded to travel on Main Street in Greenwood, Indiana. Eventually Thomas bailed out of his vehicle and proceeded to attempt to flee on foot. After a short period of time, law enforcement officers were able to locate and apprehend Thomas.

f. During the search of Howard's residence, law enforcement agents located three kilograms of cocaine which were individual wrapped and packaged similarly to the kilograms of cocaine located in the trunk of the Chevy Cobalt driven by Dwayne Bowen. Also located in Howard's residence was approximately 120 grams of crack cocaine, a scale, and a clear baggie which contained twenty separate small individual bags of marijuana.

g. The evidence demonstrates a strong probability of conviction.

h. The mandatory minimum sentence of 10 years, when coupled with the defendant's criminal history, substantially increases the seriousness of his risk for flight.

The Court having weighed the evidence regarding the factors found in 18 U.S.C. §3142(g), and based upon the totality of evidence set forth above, concludes that if the defendant had rebutted the presumptions in favor of detention, he nevertheless, would be detained, because he is a serious risk of flight and clearly and convincingly a danger to the community.

WHEREFORE, Dwayne Bowen is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. They shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government,

the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this ____ day of June, 2005.

KENNARD P. FOSTER
U.S. Magistrate Judge
Southern District of Indiana

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